

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CHRISTOPHER WHISENANT,

Petitioner,

No. 2:11-cv-0697-FCD-JFM (HC)

vs.

G. SWARTHOUT,

Respondent.

FINDINGS AND RECOMMENDATIONS

Petitioner is a state prisoner proceeding pro se with an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner claims his Fourth Amendment rights were violated when the trial court denied his motion to suppress, and his Eighth Amendment rights were violated when the trial court declined to strike one or both of his prior convictions. Petitioner argues that the sentence imposed constitutes cruel and unusual punishment.

PROCEDURAL BACKGROUND

Petitioner was convicted by a jury on September 26, 2007 of possession of a firearm (in violation of Cal. Pen. Code § 12021(a)(1)¹); and possession of ammunition (in violation of § 12316(b)(1)). See Clerk's Transcript ("CT") at 250-51. With an enhancement for

¹ All future statutory references will be to the California Penal Code unless noted otherwise.

1 two prior convictions, the trial court sentenced petitioner on February 8, 2008 to two concurrent
2 indeterminate terms of twenty-five years to life with the possibility of parole and a concurrent
3 two-year determinate term. CT at 71-72.

4 Petitioner appealed to the California Court of Appeal, Third Appellate District.
5 See Lodgment (“LD”), Appellant’s Opening Br.² In an unpublished opinion filed on February 9,
6 2010, the appellate court affirmed the judgment and sentence. Ans., Ex. A.

7 On March 22, 2010, petitioner filed a petition for review in the California
8 Supreme Court. LD, Pet’r’s Pet. for Review, Cal. Supreme Ct. On April 28, 2010, the
9 California Supreme Court summarily denied the petition. LD, Order Den. Pet. for Review, Cal.
10 Supreme Ct.

11 Petitioner did not file any petitions for post-conviction relief in the state courts.

12 Petitioner initiated this action on March 14, 2011. Respondent filed an answer on
13 June 21, 2011. Petitioner filed a traverse on August 22, 2011.

14 FACTUAL BACKGROUND³

15 On the night of April 2, 2005, Bush, [petitioner] and Benny Ramos, not a
16 party to this appeal, were in a Chevrolet Blazer that was pulled over after a
17 sheriff’s deputy heard gunshots, then saw the Blazer coming from the direction of
18 the gunshots. The Blazer contained a ballistic vest, or “body armor,” and a load
19 pistol magazine. Three loaded pistols of different calibers were found by the road
20 along the route between where the deputy began following the Blazer and where
21 he stopped it. Five bullets of unusual caliber were found in the patrol car Bush
22 had been in, and they fit one of the guns found by the roadside. The magazine
23 found in the vehicle fit a different gun found by the road. All three men had
24 felony convictions.

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27 ² Respondent does not identify the lodgments filed July 26, 2011 by number. Rather,
28 they are identified by the title of the document.

29 ³ The statement of facts is taken from the opinion of the California Court of Appeal for
30 the Third Appellate District in People v. Whisenant et al, No. C058320 (February 9, 2010), a
copy of which is attached to respondent’s answer as Exhibit A.

ANALYSIS

I. Standards for a Writ of Habeas Corpus

Federal habeas corpus relief is not available for any claim decided on the merits in state court proceedings unless the state court's adjudication of the claim:

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

Under section 2254(d)(1), a state court decision is “contrary to” clearly established United States Supreme Court precedents if it applies a rule that contradicts the governing law set forth in Supreme Court cases, or if it confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at different result. Early v. Packer, 537 U.S. 3, 7 (2002) (citing Williams v. Taylor, 529 U.S. 362, 405-406 (2000)).

Under the “unreasonable application” clause of section 2254(d)(1), a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from the Supreme Court’s decisions, but unreasonably applies that principle to the facts of the prisoner’s case. Williams, 529 U.S. at 413. A federal habeas court “may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.” Id. at 412; see also Lockyer v. Andrade, 538 U.S. 63, 75 (2003) (it is “not enough that a federal habeas court, in its independent review of the legal question, is left with a ‘firm conviction’ that the state court was ‘erroneous.’”) The court looks to the last reasoned state court decision as the basis for the state court judgment. Avila v. Galaza, 297 F.3d 911, 918 (9th Cir. 2002).

1 II. Petitioner's Claims

2 1. Ground One

3 In ground one, petitioner claims that the trial court violated his Fourth
4 Amendment rights by improperly denying his motion to suppress.

5 The last reasoned rejection of this claim is the decision of the California Court of
6 Appeal for the Third Appellate District on petitioner's direct appeal:

7 B. Facts from Suppression Hearing

8 Sacramento County Deputy Sheriff Jason Harris was the only witness at
9 the hearing [on the motion to suppress]. He had been a patrol deputy for over six
10 years. On April 2, 2005, at about 11:20 p.m., he was parked near Kiefer
11 Boulevard and Happy Lane, by Mather Air Force Base, doing paperwork. It was
a remote, industrial area, "mostly just an open area," although there were a few
residences. No businesses were open and he saw no vehicles in the 10 minutes he
was there.

12 Deputy Harris then heard at least two gunshots from the south, "very
13 close. Within a couple of hundred yards at the most." He had been in the U.S.
Army for six years, and through that experience and his duties as a deputy, he was
14 very familiar with the sound of gunshots and was certain he heard gunshots. A
Chevrolet Blazer with tinted rear windows then passed him, coming from the
15 south, about 10-15 seconds after the gun shots, "And from the sound of it, it was
accelerating" but it had not yet reached the speed limit. Deputy Harris could see
16 at least two people inside, who looked at him as the Blazer passed by. Because
that was the only vehicle he had seen in the remote area since he had been there,
17 he followed it. He paced it going 60 miles per hour in a 45 mile-per-hour zone.
He pulled the Blazer over close to a "fairly secluded" area. He stopped the
18 Blazer because of the speeding and to investigate the gunshots.

19 Deputy Harris saw there were three people in the car and he "request[ed]
20 identification from all three[.]" which they gave. When he checked and learned
all three men had violent felony convictions, including for murder, assault with a
21 deadly weapon and "Things like that[.]" he called for backup. Backup arrived
within five minutes. Out of concern about weapons in the car, the officers drew
22 their guns, called the occupants out one by one, patted each down and placed
them in separate patrol vehicles. [Petitioner] and Bush had been passengers;
Ramos had been driving.

23 Deputy Harris testified that when the men were extracted, he saw a
24 ballistic vest on the back seat.

25 Because the occupants were felons, Deputy Harris correctly believed it
was illegal for any of them to possess a ballistic vest. (See Pen. Code, § 12370,
26 subd. (a).) [Footnote omitted.] Therefore, he believed he had probable cause to
arrest them and impound the Blazer. He saw an open alcohol container, and then

1 looked in the glove box, where he found a loaded pistol magazine. His subjective
2 reason to search was because he did not want to leave a firearm in the Blazer.

3 Deputy Harris testified the entire encounter between stopping the Blazer
4 and searching the vehicle was 8-10 minutes. It usually takes him less than 10
5 minutes to stop a vehicle and write a traffic citation.

6 The trial court denied the motion.

7 C. Analysis

8 The claims on appeal can be grouped into four categories: First,
9 defendants were improperly detained because only a “hunch” connected the
10 Blazer to gunshots. Second, it was improper for Deputy Harris to obtain their
11 identification. Third, their detention was excessive, and was transformed into an
12 arrest without probable cause. Fourth, the search of the Blazer was unlawful.

13 We disagree with each of these claims.

14 1. Detention of Passengers

15 Defendants contend that as passengers in a car pulled over for a speeding
16 violation, their detention was unreasonable. They assert Deputy Harris had only a
17 “hunch” to connect them to the gunshots. We disagree. FN 3.

18 FN 3. Defendants contend all of the tangible evidence against them
19 should have been suppressed. But the guns (and the ammunition inside them,
20 which the prosecutor argued could support the ammunition charge) were found
21 abandoned by the road and were not suppressible. (See *People v. Tuck* (1977) 75
22 Cal.App.3d 639, 646; *U.S. v. McLaughlin* (9th Cir. 1975) 525 F.2d 517, 519-520.)

23 “A suspect may be detained if an officer has a reasonable suspicion that
24 criminal activity is afoot and that the suspect is connected with it. [Citation.] The
25 officer “must be able to point to specific and articulable facts which, taken
26 together with rational inferences from those facts, reasonably warrant” his action.
[Citation.] This is a totality of the circumstances evaluation, in light of the
officer’s training and experience.” (*People v. Osborne* (2009) 175 Cal.App.4th
1052, 1058 (*Osborne*)). “Law enforcement officers may ‘draw on their own
experience and specialized training to make inferences from and deductions about
the cumulative information available to them that “might well elude an untrained
person.” [Citations.]” (*People v. Hernandez* (2008) 45 Cal.4th 295, 299.) But
“officers are not entitled to rely on mere hunches.” (*Ibid.*)

Deputy Harris had more than a hunch about the Blazer’s connection to the
gunshots, he had a reasonable suspicion. He had been parked in a remote area
late at night for 10 minutes and had not seen any cars. Within 10-15 seconds of
the moment he heard two gunshots nearby, the Blazer came from the direction of
those gunshots, accelerating. Given the totality of the circumstances, we agree
with the trial court’s observation that Deputy Harris “would be derelict in his duty
if he did not pursue the vehicle at least to investigate whether or not that vehicle
had some connection to those gunshots.”

1 In addition to arguing there was insufficient cause to believe the Blazer
 2 had a connection to the gunshots, Bush contends those shots might have been
 3 “legal hunting, target practice, or an accidental discharge of a weapon. Possibly it
 4 was not even a gunshot but a car backfiring.” The fact there may ultimately have
 5 been an innocent explanation for what Deputy Harris heard does not mean he
 6 lacked reasonable grounds for suspecting criminality. (See *People v. Foranyic*
 (1998) 64 Cal.App.4th 186, 189-190.) Further, Deputy Harris testified what he
 heard was not a car backfiring, and he had ample experience to know he heard
 gunshots. The fact there were two shots makes the theory of accidental discharge
 implausible, and the fact it was *nighttime* makes the theories of innocent hunting
 or target shooting implausible.

7 Because Deputy Harris reasonably believed the Blazer and its occupants
 8 were connected to the gunshots, it was proper for him to detain them to
 investigate those gunshots.

9 2. Identification of Passengers

10 Defendants contend Deputy Harris could not “require” or “demand” that
 11 they identify themselves.

12 But, as the Attorney General notes, Deputy Harris asked for identification,
 he did not demand it.

13 “In the ordinary course a police officer is free to ask a person for
 14 identification without implicating the Fourth Amendment. ‘[I]nterrogation
 15 relating to one’s identity or a request for identification by the police does not, by
 16 itself, constitute a Fourth Amendment seizure.’” (*Hiibel v. Sixth Judicial Dist. Ct.*
 (2004) 542 U.S. 177, 185 [159 L.Ed.2d 292, 302].) “Obtaining a suspect’s name
 17 in the course of a Terry stop serves important government interests. Knowledge
 18 of identity may inform an officer that a suspect is wanted for another offense, or
 19 has a record of violence or mental disorder. On the other hand, knowing identity
 may help clear a suspect and allow the police to concentrate their efforts
 elsewhere.” (*Id.* at p. 186 [159 L.Ed.2d at p. 303].) It is “well established that an
 officer may ask a suspect to identify himself in the course of a Terry stop[.]” (*Id.*
 at p. 186 [159 L.Ed.2d at p. 303]; see *People v. Vibanco* (2007) 151 Cal.App.4th
 1, 13-14 (*Vibanco*).)

20 Accordingly, Deputy Harris properly asked defendants for their
 21 identification.

22 Bush argues that because a passenger is necessarily detained when a
 23 vehicle is stopped (*Brendlin v. California* (2007) 551 U.S. 249 [168 L.Ed.2d
 132]), “an officer needs a specific reason for requiring identification and cannot
 24 seek identification simply because of vague investigatory reasons to satisfy a
 25 hunch.” He relies heavily on *People v. Spicer* (1984) 157 Cal.App.3d 213. In
 26 that case a car was stopped and, as the driver was given a field sobriety test by
 one officer, another officer approached the passenger. This officer asked the
 passenger for identification, although it was stipulated that he “had no reasonable
 basis for suspecting her of any crime.” (*Id.* at p. 216.) In such circumstances, the
 court held the passenger had been detained. In reaching that conclusion the court

1 relied in part on the fact that the officer had not told the passenger why he asked
 2 her for her identification, and observed that a citizen could rationally interpret a
 3 request for identification by a peace officer to be a demand. (*Id.* at pp. 219-220.)
 4 But as stated, in *Spicer*, the parties stipulated there was no reason to think the
 5 passenger had done anything suspicious. (*Id.* at p. 216.) Here, in contrast,
 6 Deputy Harris reasonably connected the Blazer occupants with a suspicious
 7 shooting. The detention of the passengers was not based on the speeding offense
 8 committed by the driver, Ramos.

9 Bush also argues “less invasive avenues of inquiry, other than demanding
 10 identification cards” could have been employed, and vaguely states Deputy Harris
 11 “could have reasonably sought information about the gunshots he claimed to hear
 12 without first requiring that the passengers provide identification. Only as a follow
 13 up to such initial inquiry should the deputy be entitled to ask for identification[.]”
 14 This is unrealistic. We doubt that if Deputy Harris had asked if the men had been
 15 shooting that he would have received an answer that would have dispelled his
 16 concerns. Asking for identification to find out who the men were was a prudent
 17 early step to take. FN 4.

18 FN 4. [Petitioner] cites *People v. Loudermilk* (1987) 195 Cal.App.3d 996,
 19 for the proposition that an officer may not ask passengers for identification.
 20 *Loudermilk* did not involve a traffic stop, but held an officer may ask for
 21 identification from a person lawfully detained. (*Id.* at pp. 1000-1003.) It also
 22 held that the failure of a person to identify himself “may by itself be considered
 23 suspect and together with surrounding events may create probable cause to
 24 arrest.” (*Id.* at p. 1002.)

25 Because we hold that defendants were lawfully detained, it was proper to
 26 ask them for identification.

3. Excessive Detention

Defendants contend it was improper to handcuff them and place them in
 patrol cars during a traffic stop, effectively arresting them without probable cause.

Again, defendants were not merely passengers in a vehicle stopped for a
 traffic offense, they were occupants of a vehicle reasonably suspected of
 involvement in a shooting, and were detained to allow that matter to be
 investigated. “To justify a patdown of the driver or a passenger during a traffic
 stop, however, just as in the case of a pedestrian reasonably suspected of criminal
 activity, the police must harbor reasonable suspicion that the person subjected to
 the frisk is armed and dangerous.” (*Arizona v. Johnson* (2009) 555 U.S. 249,
 ——— [172 L.Ed.2d 694, 700]; see *Osborne*, supra, 175 Cal.App.4th at p. 1059.)
 “[T]he handcuffing of a detained individual does not necessarily convert the
 detention into a de facto arrest. [Citation.] . . . [A] police officer may handcuff a
 detainee without converting the detention into an arrest if the handcuffing is brief
 and reasonably necessary under the circumstances.” (*Osborne*, supra, 175
 Cal.App.4th at p. 1062.)

At the time the men were removed from the Blazer and handcuffed, they
 reasonably seemed to be connected to the gunshots. It was nighttime in a remote

1 area of Sacramento County. The officers knew all three men had been convicted
 2 of violent felonies. In such circumstances, removing the men from the Blazer to
 3 handcuff them as part of the investigative detention was a prudent method of
 4 continuing the investigation while protecting the safety of the officers. (See
People v. Stier (2008) 168 Cal.App.4th 21, 27-28; *Vibanco*, supra, 151
 Cal.App.4th at pp. 11-12.)

5 Before the Blazer search began, the men were detained for about the same
 6 time it would have taken to process a traffic citation, therefore the length of the
 7 detention was not excessive. Nor was there dilatory conduct; the record shows
 8 “the police diligently pursued a means of investigation reasonably designed to
 9 dispel or confirm their suspicions quickly, using the least intrusive means
 reasonably available under the circumstances.” (*In re Carlos M.* (1990) 220
 Cal.App.3d 372, 384-385, quoted with approval by *People v. Celis* (2004) 33
 Cal.4th 667, 674-675.) This was not an improper “unnecessary extension of the
 traffic detention to investigate extraneous matters” (*Williams v. Superior Court*
 (1985) 168 Cal.App.3d 349, 359) as [petitioner] claims.

10 Accordingly, the detention was not excessive in manner or duration. As
 11 discussed in the next section, probable cause to arrest was discovered when the
 men were removed from the Blazer.

12 4. Search of the Blazer

13 In their opening briefs, defendants contended the Blazer search was not a
 14 valid search incident to a lawful arrest and was not supported by probable cause.
 After the opening briefs were filed, the United States Supreme Court decided
Arizona v. Gant (2009) 556 U.S. — [173 L.Ed.2d 485] (*Gant*), holding:
 15 “Police may search a vehicle incident to a recent occupant’s arrest only if the
 16 arrestee is within reaching distance of the passenger compartment at the time of
 the search or it is reasonable to believe the vehicle contains evidence of the
 offense of arrest.” (*Id.* at p. — [173 L.Ed.2d at p. 501].) In their reply
 17 briefs, defendants argue the Blazer search was unlawful because all three
 occupants were already handcuffed and in patrol cars.

18 Although defendants are correct that the Blazer search could not be
 19 justified by the first part of the *Gant* holding, the search was justified by the
 20 second part, because the officers had probable cause to arrest all three defendants
 when they saw the ballistic vest in plain sight, giving them reason to believe the
 Blazer had other evidence of the arrest offense. Defendants assert the ballistic
 21 vest, critical to probable cause, was found during the Blazer search. But viewing
 the evidence in the light favorable to the trial court’s ruling (*Munoz*, supra, 167
 22 Cal.App.4th at pp. 132-133), Deputy Harris saw the vest in plain sight when the
 men were taken out of the Blazer. His relevant testimony is as follows:

23 1) “Q. After the defendants are removed from the vehicle, what do
 24 you do next’

25 “A. We search the vehicle.

26 ////

1 “Q. When you first look into the vehicle, do you see anything at
2 the point that you first look inside’ . . .

3 “A. There was a ballistic vest in plain view on the back seat of the
4 vehicle.

5 “Q. Now with — given your understanding of the defendants’
6 criminal histories, is that a crime’

7 “A. Yes.

8 “Q. Are each of the defendants arrestable in your mind at that
9 point’

10 “A. Yes.

11 “Q. Can the car be impounded in your mind at that point’

12 “A. Yes.

13 “Q. What else do you see as you just look in the car’

14 “A. An open container of alcohol.”

15 2) “Q. So it is only when you order them out of the car, right - -

16 “A. Right.

17 “Q. -- that you are able to see what you identify as a bullet-proof
18 vest which . . . you at that point know is contraband; is that right’

19 “A. Right.”

20 3) “Q. Now at that point when backup arrives, how do you decide
21 that you are going to get into that car to make the search’

22 “A. I believed it was necessary for my safety and for the safety of
23 my fellow officers to ensure that there were no firearms in the
24 vehicle.

25 “Q. And what do you do then’

26 “A. We look in the vehicle and find that there is a ballistic vest on
the back seat.”

Although these passages contain some ambiguity, taking them together,
the trial court could rationally find that as the men were taken out of the Blazer,
the vest was in plain sight, that is, seen before the officers entered the Blazer to
search it. In fact, this is how the parties interpreted the evidence in the trial court.
Defense counsel focused on the claim it was illegal to take the men out of the
Blazer, contending Deputy Harris could not see the vest until they were taken out

1 of the Blazer; the prosecutor argued the men could be arrested once the vest was
2 seen. These arguments comport with our conclusion that the testimony, albeit not
3 crystalline, supports the fact that the vest was in plain sight before the search of
4 the Blazer began.

5 Because it is unlawful for convicted felons to possess such a vest (see Pen.
6 Code, § 12370, subd. (a)), once Deputy Harris saw the vest he had probable cause
7 to arrest all three men. At that point, Deputy Harris merely needed a “reasonable
8 basis to believe” that the Blazer contained evidence pertaining to the offense of
9 arrest. (*Gant*, supra, 556 U.S. at p. ——— [173 L.Ed.2d at p. 496]; *Osborne*,
10 supra, 175 Cal.App.4th at pp. 1063-1065.) Having heard gunshots he linked to the
11 Blazer, having identified the occupants as violent felons, and having seen a
12 ballistic vest in the Blazer, Deputy Harris had a reasonable basis to seize the vest
13 and search the Blazer for other evidence of the offense. Accordingly, the Blazer
14 search was lawful.

15 For all of the above reasons, we conclude the trial court properly denied
16 the motion to suppress evidence.

17 People v. Whisenant et al., slip op. at 3-15.

18 Under Stone v. Powell, 428 U.S. 465 (1976), petitioner’s claim that his motion to
19 suppress was improperly denied in violation of the Fourth Amendment is barred. In Stone, the
20 Supreme Court held that “where the State has provided an opportunity for full and fair litigation
21 of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted
22 federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or
23 seizure was introduced at his trial.” Id. at 482. The Supreme Court instructed that state
24 prisoners were not entitled to federal habeas relief on Fourth Amendment grounds if they were
25 able to litigate fully their Fourth Amendment claims in state court. Id. Thus, a Fourth
26 Amendment claim can only be litigated on federal habeas where petitioner demonstrates that the
state did not provide an opportunity for full and fair litigation of the claim; it is immaterial
whether the petitioner actually litigated the Fourth Amendment claim, whether the state courts
correctly disposed of the Fourth Amendment issues tendered to them, or even whether the claim
was correctly understood. Ortiz-Sandoval v. Gomez, 81 F.3d 891, 899 (9th Cir. 1996); Siripongs
v. Calderon, 35 F.3d 1308, 1321 (9th Cir. 1994); Gordan v. Duran, 895 F.2d 610, 613 (9th Cir.
1990).

1 The record shows that petitioner was provided with the opportunity to litigate
2 fully his Fourth Amendment claims. A defendant may move to suppress illegally obtained
3 evidence in the trial court pursuant to California Penal Code § 1538.5(a) which provides:

4 (1) A defendant may move . . . to suppress as evidence any tangible or intangible
5 thing obtained as a result of a search or seizure on either of the following
6 grounds:

6 (A) The search or seizure without a warrant was unreasonable.

7 (B) The search or seizure with a warrant was unreasonable because
8 any of the following apply:

9 (I) The warrant is insufficient on its face.

10 (ii) The property or evidence obtained is not that described in the
11 warrant.

12 (iii) There was not probable cause for the issuance of the
13 warrant.

14 (iv) The method of execution of the warrant violated federal or
15 state constitutional standards.

16 (v) There was any other violation of federal or state
17 constitutional standards.

18 Id.

19 Here, the trial court denied petitioner's motion to suppress the search warrant
20 after a hearing was conducted pursuant to Cal. Penal Code § 1538.5. Reporter's Transcript
21 ("RT") at 15-107. After an evidentiary hearing, the trial court held that petitioner's Fourth
22 Amendment rights were not violated when the Blazer was stopped, when the police officer asked
23 for identification of the passengers and when the officer found evidence that was used to convict
24 petitioner. See id. It is evident that petitioner was provided a full and fair opportunity to litigate
25 his Fourth Amendment claims. Therefore, this claim is barred from federal habeas review under
26 Stone v. Powell, 428 U.S. at 481-82.

For the foregoing reasons, petitioner's claim that his Fourth Amendment rights
were violated is barred in this federal habeas proceeding.

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2 2. Ground Two

3 Petitioner next argues that his Eighth Amendment rights were violated when the
4 trial court considered two prior convictions when sentencing petitioner to twenty-five years to
5 life. Petitioner argues that the sentence imposed constitutes cruel and unusual punishment.

6 The last reasoned rejection of this claim is the decision of the California Court of
7 Appeal for the Third Appellate District on petitioner's direct appeal:

8 II. [Petitioner]'s Strikes

9 [Petitioner] contends the trial court abused its discretion by denying his
10 [People v. Superior Court (*Romero*) 13 Cal.4th 497]] motion to strike one of his
11 strikes, and for that reason his sentence constitutes impermissible cruel
punishment under the Eighth Amendment to the United States Constitution. We
disagree.

12 A. Facts Regarding the *Romero* Motion

13 [Petitioner] had two strike convictions for assault with a firearm (Pen.
14 Code, § 245, subd. (a)(2)) committed at separate times. [Petitioner]'s written
15 *Romero* motion argued his last strike was seven years old and that he had not
16 been in trouble since his release from prison. He had been regularly employed,
17 was married with five children, and was a dutiful parent, helping to coach one
child's sports teams and attending school functions. He provided a number of
letters of support. [Petitioner] argued the evidence of the current offense was
weak and that his last strike arose from a plea he entered after several hung
juries. He also contended the present crimes were victimless crimes.

18 The People opposed the *Romero* motion. In part the People contended
19 the possession of three loaded pistols by three convicted felons—known gang
members with long criminal records—was an aggravating circumstance.

20 The People also set forth a statement of [petitioner]'s criminal history, as
21 did the probation report, and because [petitioner] did not interpose any
22 objections, we presume those documents accurately reflect his criminal history.
(See *People v. Evans* (1983) 141 Cal.App.3d 1019, 1021.)

23 After juvenile matters involving stolen cars, as an adult, [petitioner] was
24 convicted in 1992 of second-degree burglary, and after he violated probation, he
25 was sent to prison. Also in 1992 he was convicted of misdemeanor possession of
26 a firearm by a felon. In 1994, [petitioner] wounded a person by shooting from
his car, and he was convicted of assault with a firearm and sent to prison. In
1997, he was paroled, but within six months he committed a gang-related
shooting from his car, leaving the victim a quadriplegic. He was convicted of
assault with a firearm, for the benefit of a street gang, and he was again sent to

1 prison. In 2001, defendant was paroled, and after one return to custody, he was
 2 /////
 3 discharged from parole less than three months before the current offenses.
 4 [Petitioner], Bush, and Ramos were validated members of a criminal street gang.

5 After hearing argument, including a personal plea by [petitioner], the trial
 6 court concluded he was “in many ways the poster child why the three strikes law
 7 should be applied.” The *Romero* motion was denied.

8 B. *Romero* Motion

9 In deciding a *Romero* motion, the trial court must “consider whether, in
 10 light of the nature and circumstances of his present felonies and prior serious
 11 and/or violent felony convictions, and the particulars of his background,
 12 character, and prospects, the defendant may be deemed outside the scheme’s
 13 spirit, in whole or in part, and hence should be treated as though he had not
 14 previously been convicted of one or more serious and/or violent felonies.”
 15 (*People v. Williams* (1998) 17 Cal.4th 148, 161; see *People v. Philpot* (2004) 122
 16 Cal.App.4th 893, 905.) We review the ruling under the abuse of discretion
 17 standard:

18 “In reviewing for abuse of discretion, we are guided by
 19 two fundamental precepts. First, “[t]he burden is on the party
 20 attacking the sentence to clearly show that the sentencing decision
 21 was irrational or arbitrary. [Citation.] In the absence of such a
 22 showing, the trial court is presumed to have acted to achieve
 23 legitimate sentencing objectives, and its discretionary
 24 determination to impose a particular sentence will not be set aside
 25 on review.” [Citations.] Second, a “decision will not be
 26 reversed merely because reasonable people might disagree. ‘An
 appellate tribunal is neither authorized nor warranted in
 substituting its judgment for the judgment of the trial judge.’”
 [Citations.] Taken together, these precepts establish that a trial
 court does not abuse its discretion unless its decision is so
 irrational or arbitrary that no reasonable person could agree with
 it.” (*People v. Carmony* (2004) 33 Cal.4th 367, 376-377
 (*Carmony*); see *People v. Myers* (1999) 69 Cal.App.4th 305, 310.)

21 Only in extraordinary circumstances will a career criminal fall outside the
 22 scheme’s spirit. (*Carmony*, supra, 33 Cal.4th at p. 378; *People v. McGlothin*
 23 (1998) 67 Cal.App.4th 468, 474.)

24 [Petitioner]’s motion in part argued his strikes were remote. A prior may
 25 be deemed remote when it is followed by a long crime-free period. (*People v.*
 26 *Philpot*, supra, 122 Cal.App.4th at p. 906 [trial court “could not overlook the fact
 defendant consistently committed criminal offenses for the past 20 years”];
People v. Humphrey (1997) 58 Cal.App.4th 809, 813 [“Where, as here, the
 defendant has led a continuous life of crime after the prior, there has been no
 „washing out’ and there is simply nothing mitigating about a 20-year-old
 prior”].)

1 ////

2 Viewed in this light, there was nothing “remote” about [petitioner]’s
3 criminal history. His strikes involved two shootings from cars in which his
4 victims were injured, and he committed the instant crimes within three months of
5 his discharge from parole. He was found with two other gang members in a
6 vehicle that had had three firearms in it before they were discarded, showing a
7 lack of reform. On these facts, the trial court properly rejected the claim of
8 remoteness.

9 [Petitioner] argues the current offenses were not violent. The purpose of
10 Penal Code section 12021 is to protect public welfare by precluding the
11 possession of guns by those who are more likely to use them for improper
12 purposes, that is, convicted felons. (*People v. Pepper* (1996) 41 Cal.App.4th
13 1029, 1037.) Although [petitioner] did not use a gun in this case, as a matter of
14 law such possession carried the potential for violence. As stated, the strikes
15 involved shootings from cars, and in this case he was with other gang members,
16 armed with guns. Thus, although the current offenses are not technically violent,
17 we are not persuaded that their nature militated in favor of striking a strike.
18 Moreover, “the nonviolent or nonthreatening nature of the [current] felony
19 cannot alone take the crime outside the spirit of the law.” (*People v. Strong*
20 (2001) 87 Cal.App.4th 328, 344.)

21 [Petitioner] takes a portion of the trial court’s comments out of context.
22 Defense counsel stated “So the evidence was very slim against my client.
23 Unfortunately, my client has the worst record and he faces the most severe
24 punishment. [¶] THE COURT: Yes.” On appeal [petitioner] states the trial
25 court “noted the ‘slim evidence’ connecting appellant to the instant offense.”
26 This is not a fair reading of the record. The trial court may have been indicating
he understood the argument, but more likely was saying “Yes” to the last
sentence, agreeing that [petitioner] had the “worst record” of the three men.

 Based on [petitioner]’s record, and the circumstances of this offense, the
trial court did not abuse its discretion in concluding he fell within the spirit of the
three strikes law.

19 C. Eighth Amendment Claim

20 We recently held that a noncapital sentence may violate the Eighth
21 Amendment if “‘an inference of gross disproportionality’” [citation] could be
22 made by weighing the crime and the defendant’s sentence ‘in light of the harm
23 caused or threatened to the victim or to society, and the culpability of the
24 offender.’” (*People v. Nichols* (2009) 176 Cal.App.4th 428, 435.)

25 [Petitioner] contends his 25-year-to-life sentence violates the Eighth
26 Amendment because his current offenses are “relatively minor,” and were
“proven by the barest circumstantial evidence.” We disagree.

 Taking the latter point first, counsel does not cite any authority
supporting the proposition that the perceived strength or weakness of the
evidence is a relevant factor for Eighth Amendment purposes. For lack of
authority, we reject the proposition. (See *People v. Stanley* (1995) 10 Cal.4th

1 764, 793; *People v. Diaz* (1983) 140 Cal.App.3d 813, 824.) We also reject
 2 counsel's assertion that the facts "suggest a strong possibility of a person in the
 wrong place at the wrong time."

3 As for the former point, as we have explained above, although the instant
 4 crimes did not involve the commission of violence, they were not technical law
 5 violations. [Petitioner], a convicted felon and known gang member, in the
 6 company of two other convicted felons who were also gang members, was in a
 vehicle with a ballistic vest, three pistols and ammunition (although the loaded
 guns were tossed out of the Blazer later). This was a highly dangerous situation,
 particularly given that both of [petitioner]'s strikes involved shooting people
 from cars.

7
 8 Nor is disproportionality shown by [petitioner]'s references to the
 sentences for many other crimes, because he fails to account for his strikes in
 9 making that argument. For example, he notes that mayhem is punishable by 2, 4
 or 8 years. (Pen. Code, §§ 203, 204.) But a person convicted of mayhem with
 10 two strikes would receive the sentence [petitioner] received. That mode of
 argument does not show disproportionality.

11 [Petitioner] claims the trial court found the sentence "wholly
 12 disproportionate' to the charges." This again misreads the record. The trial
 court noted that because [petitioner] had two strikes, he faced a sentence that
 13 otherwise would be disproportionate to the sentences of Bush and Ramos. The
 trial court said "if you focus just on this particular offense, then it seems wholly
 14 disproportionate to give somebody 25 years to 22 life[.]" In context, the trial
 court did not find the three strikes sentence to be disproportionate, given
 [petitioner]'s criminal record.

15
 16 In *People v. Cooper* (1996) 43 Cal.App.4th 815, Cooper had two robbery
 strikes and his current offense was possession by a felon of a firearm. Noting
 17 that the current crime was a serious offense and recidivism justifies "longer
 sentences for subsequent offenses," the court held Cooper's sentence did "not
 18 constitute cruel and unusual punishment under the Eighth Amendment."
 (*Cooper*, supra, 43 Cal.App.4th at pp. 824-825.) [Petitioner]'s current offense,
 19 like Cooper's, is possession by a felon of a firearm, and [petitioner]'s strikes,
 assaults with firearms, are more severe than Cooper's robbery strikes.
 Accordingly, we reject his Eighth Amendment claim.

20 People v. Whisenant et al., slip op. at 15-22.

21
 22 To the extent petitioner argues that the state court abused its discretion by giving
 credit to two prior convictions, the court finds that this is not cognizable on federal habeas
 23 review. See Lewis v. Jeffers, 497 U.S. 764, 780 (1990); see also Campbell v. Blodgett, 997 F.2d
 24 512, 522 (9th Cir.1992) ("[a]s the Supreme Court has stated time and again, federal habeas
 25 corpus relief does not lie for errors of state law"); Miller v. Vasquez, 868 F.2d 1116, 1118-19
 26

1 (9th Cir. 1989). “[A] state court's interpretation of its [sentencing] statute does not raise a
2 federal question.” Sturm v. California Adult Authority, 395 F.2d 446, 448 (9th Cir. 1967);
3 Cacoperdo v. Demosthenes, 37 F.3d 504, 506 (9th Cir. 1994) (petitioner's claim that the state
4 court erred in imposing consecutive sentences was not cognizable in federal habeas); Hendricks
5 v. Zenon, 993 F.2d 664, 674 (9th Cir. 1993) (defendant’s claim that state court was required to
6 merge his convictions was not cognizable); Watts v. Bonneville, 879 F.2d 685, 687 (9th Cir.
7 1989) (petitioner’s claim that the trial court violated state law provision in sentencing him was
8 not cognizable).

9 The United States Supreme Court has stated that in addressing an Eighth
10 Amendment challenge to a prison sentence, the “only relevant clearly established law amenable
11 to the [AEDPA] framework is the gross disproportionality principle, the precise contours of
12 which are unclear and applicable only in the ‘exceedingly rare’ and ‘extreme’ case.” Lockyer v.
13 Andrade, 538 U.S. 63, 73 (2003) (citing Harmelin v. Michigan, 501 U.S. 957, 1001 (1991);
14 Solem v. Helm, 463 U.S. 277, 290 (1983); and Rummel v. Estelle, 445 U.S. 263, 272 (1980)). In
15 Andrade, the Supreme Court concluded that two consecutive twenty-five years to life sentences
16 with the possibility of parole, imposed in that case under California’s Three Strikes Law
17 following two felony convictions for petty theft with a prior, did not amount to cruel and unusual
18 punishment. 538 U.S. at 77; see also Ewing v. California, 538 U.S. 11 (2003) (holding that a
19 sentence of twenty-five years to life imposed for felony grand theft under California’s Three
20 Strikes law did not violate the Eighth Amendment).

21 Following the decision in Andrade, the United States Court of Appeals for the
22 Ninth Circuit has held that a sentence of twenty-five years to life in prison for a third shoplifting
23 offense, a “wobbler” under state law⁴, constituted cruel and unusual punishment. Ramirez v.
24 Castro, 365 F.3d 755 (9th Cir. 2004). In so holding, the court in Ramirez relied upon the limited

25
26 ⁴ A “wobbler” is an offense that can be punished as either a misdemeanor or a felony
under applicable state law. See Ferreira v. Ashcroft, 382 F.3d 1045, 1051 (9th Cir. 2004).

1 and non-violent nature of the petitioner's prior criminal history and the fact that the petitioner's
2 only prior period of incarceration had been a single one-year jail sentence. Id. at 768-69.
3 Thereafter, in Rios v. Garcia, 390 F.3d 1082 (9th Cir. 2004), the Ninth Circuit distinguished the
4 holding in Ramirez from the situation it confronted, finding that the petitioner in Rios had a
5 "lengthy criminal history," had "been incarcerated several times," and that the prior strikes used
6 to enhance his sentence had "involved the threat of violence." Id. at 1086.

7 This court finds that the sentence imposed upon petitioner in this case does not
8 fall within the type of "exceedingly rare" circumstance that would support a finding that his
9 sentence violates the Eighth Amendment. In connection with the state court judgment, the
10 sentence of which he attacks in this habeas petition, petitioner was convicted of being an ex-
11 felon in possession of a firearm and ammunition. In view of the decisions noted above, the court
12 cannot conclude that petitioner's sentence is grossly disproportionate to those crimes. See
13 Harmelin, 501 U.S. at 1004-05 (life imprisonment without possibility of parole for possession of
14 24 ounces of cocaine raises no inference of gross disproportionality). Moreover, as discussed by
15 the state appellate court, petitioner has an extensive criminal record. People v. Whisenant et al.,
16 slip op. at 16-17. Under these circumstances, the state court's rejection of petitioner's Eighth
17 Amendment claim was neither contrary to, nor an unreasonable application of clearly established
18 federal law. Therefore, petitioner is not entitled to relief on his Eighth Amendment claim.

19 For all of the foregoing reasons, petitioner's application for a writ of habeas
20 corpus should be denied. Pursuant to Rule 11 of the Rules Governing Section 2254 Cases in the
21 United States District Courts, "[t]he district court must issue or a deny a certificate of
22 appealability when it enters a final order adverse to the applicant." Rule 11, 28 U.S.C. foll. §
23 2254. A certificate of appealability may issue under 28 U.S.C. § 2253 "only if the applicant has
24 made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The
25 court must either issue a certificate of appealability indicating which issues satisfy the required
26 showing or must state the reasons why such a certificate should not issue. Fed. R. App. P. 22(b).

1 For the reasons set forth in these findings and recommendations, petitioner has not made a
2 substantial showing of the denial of a constitutional right. Accordingly, no certificate of
3 appealability should issue.

4 Accordingly, IT IS HEREBY RECOMMENDED that

- 5 1. Petitioner's application for a writ of habeas corpus be denied; and
- 6 2. The district court decline to issue a certificate of appealability.

7 These findings and recommendations are submitted to the United States District
8 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen
9 days after being served with these findings and recommendations, any party may file written
10 objections with the court and serve a copy on all parties. Such a document should be captioned
11 "Objections to Magistrate Judge's Findings and Recommendations." Any response to the
12 objections shall be filed and served within fourteen days after service of the objections. The
13 parties are advised that failure to file objections within the specified time may waive the right to
14 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

15 DATED: August 28, 2011.

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17 
18 UNITED STATES MAGISTRATE JUDGE

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